IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No. 24 of 2005
DATE OF DECISION: March 20, 2007

M/S MITTAL CONSTRUCTION CO.

.....PETITIONER
through Mr. Vikram Aggarwal ,
Advocate.

VERSUS

UNION OF INDIA & OTHERS

.....RESPONDENT
through Mr. Puneet Jindal,
Advocate

CORAM: HON'BLE MR. JUSTICE VIJENDER JAIN, CHIEF JUSTICE

1. **Whether Reporters of Local Newspapers may be allowed to see the judgment?**
2. **To be referred to the Reporters or not?**
3. **Whether the judgment should be reported in the Digest?**

VIJENDER JAIN, CHIEF JUSTICE (ORAL)

This petition has been filed by the petitioner *inter-alia* on the ground that there exists an arbitration clause in the contract between the parties i.e. Annexure P-1, which reads thus:-

"**64. Demand for Arbitration**

(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case,

save the excepted matters referred to in clause 63 of these conditions, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

(ii) The demand of arbitration shall specify the matter which are in question, dispute or difference. On such dispute(s) or difference(s) in respect of which the demand has been made, shall be referred to arbitration and other matters shall not be included in the referred to arbitration and other matters shall not be included in the reference.

(iii) If the contractor(s) does/do not prefer his/their specific and final claim in writing, within a period of 90 days of receiving the intimation from the Government that the final bills is ready for payment, he/they will be deemed to have waived his/ their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

(2) Obligation during pendency of arbitration- Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for arbitrator or arbitrators to consider and decide whether or not such work should continue during arbitration proceedings.

(3)Arbitration – (a) (i) A sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is

below Rs.5,00,000/- (Rupees Five lakh) and in cases where the issues involved are not of a complicated nature. The General Manager shall be the Sole Judge to decide whether r not the issues involved are or a complicated nature.

(3)(a) (ii) The Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the matter laid in Clause 64(3) (b) for all claims of Rs.5,00,000/- (Rupees five lakhs) and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues involved are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions, the matter under disputes will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

(3)(a)(iii) It is a term of this contract that no person other than a gazetted Railway Officer should act as an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

(3)(a)(iv) In case where the claim is up to Rs.3,00,000/- (Rs. Three lakh) the Arbitrator(s)/ Umpire so appointed, as the case may be, shall give the award on all matters referred to arbitration indicating therein breakup of the sums awarded separately on each individual item of dispute. In cases where the claim is more than Rs.3,00,000/- (Rs. Three lakh), the Arbitrator(s)/ Umpire

so appointed, as the case may be, shall give intelligible award (i.e. the reasoning leading to the award should be stated) with the sums awarded separately on each individual item of dispute referred to arbitration.

(3) (b) For the purpose of appointing " two arbitrators" as referred to more than three names of Gazetted Railway Officers of one or more departments of the Railway to the Contractor who will be asked to suggest to the General Manager one name out of the list for appointment as the contractor's nominee. The General Manager, while so appointing the contractor's nominee, will also appoint a second arbitrator as the Railway's nominee either from the panel of from outside the panel, ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department. Before entering upon the reference the two Arbitrators shall nominate an Umpire who shall be a Gazetted Railway Officer to whom the case will be referred to in the event of any difference between the two Arbitrators. Officers of the Junior Administrative grade of the Accounts Department of the Railways shall be considered as of equal status of the officers in the intermediate administrative grade of other departments of the Railway for the purpose of appointment as arbitrator....."

It is the case of the petitioner that the work was to be completed by 30.11.2002. However, the petitioner finished the work 10 days in advance i.e. by 20.11.2002. It is own case of the petitioner that the final bill was prepared on 20.12.2002 and the same was paid by the

respondent.

Learned counsel for the petitioner has contended that the arbitration clause was invoked vide notice dated 08.07.2003 and along with the said notice claims raised were also annexed. It is the case of the petitioner that inspite of the receipt of the letter, the respondent in terms of the arbitration clause did not supply the vacancy of the Arbitrator. It has also been contended before me by the counsel for the petitioner that the non-supply of vacancy by the respondent on the ground that the petitioner has received a sum of Rs.50,990/- without protest will not de-bar this Court from appointing the Arbitrator. In support of his contention, learned counsel for the petitioner has relied upon the judgment rendered in ***Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663.*** Learned counsel for the petitioner has relied upon paragraphs 27,28 and 29 of the aforesaid judgment, which read as under:-

> " A person may sometimes have to succumb to the pressure of the other party to the bargain, who is in a stronger position. Although it may not be strictly in place but the court cannot shut its eyes to the ground reality that in a case where a contractor has made a huge investment, he cannot afford not to take from the employer the amount due under the bills, for various reasons, which may include discharge of his liability towards banks, financial institutions and other persons. In such a situation, public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts."

On the other hand, learned counsel for the respondent has contended that it is not a case where a No Dues Certificate was not issued or the petitioner has been made the payment after receipt of the notice invoking the arbitration clause. It was further contended before me by learned counsel for the respondent that after the receipt of the notice dated 08.07.2003, the petitioner was paid a sum of Rs.50,990/- on 31.07.2003 and on 08.08.2003, the petitioner sent a communication that the dispute raised by the petitioner had been resolved and, therefore, he had withdrawn the claim of the arbitration. In support of this contention, learned counsel for the petitioner has relied upon a judgment rendered in ***M/s P.K.Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corporation 1994 Supp.(3) SCC* 126:**

> **"6.** The reading of the above arbitration clause would clearly establish that all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claims, rights, matter or things whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of the N.T.P.C. Ltd. On his inability or unwillingness, another arbitrator appointed by C.M.D. Alone has to arbitrate the dispute. It shall be referred to

> the named arbitrator. But there must exist a subsisting dispute. Admittedly the appellant acknowledged in writing accepting the correctness of the measurements as well as the final settlement and received the amount. Thereafter no arbitrable dispute arises for reference."

I have given my careful consideration and heard both the parties at length.

A proposition of law, as stated by the counsel for the parties, incorporated in the N.T.P.C. and Ramaiah cases (supra) is no more res-integra . The question for determination is whether after withdrawal of letter dated 08.07.2003 by way of letter dated 08.08.2003 any alive claim remains, which requires invokation of the arbitration clause, because letter dated 08.08.2003 written by the petitioner was to the following terms:-

> " All the disputed points raised by them in Arbitration has been resolved, therefore, I withdraw demand of Arbitration."

From the perusal of the aforesaid letter dated 08.08.2003, can it be said that there was any alive claim on which the matter has to be referred for arbitration? The answer has to be in negative. There is a difference of time in making the demand i.e. Invoking the arbitration on 08.07.2003, amount received on 31.07.2003 and writing of the communication reproduced above on 08.08.2003.

I repeatedly asked the counsel for the petitioner that after 08.08.2003 whether the petitioner has invoked the arbitration clause on the ground of non-payment of the amount in terms of the claims received

by the petitioner pursuant to its letter dated 08.07.2003, but he failed to show any such letter invoking the arbitration clause. Having not done so, the petitioner cannot pray for appointment of Arbitrator to adjudicate upon the claims raised by him.

The petition being not maintainable is dismissed.

(VIJENDER JAIN)
CHIEF JUSTICE

March 20, 2007
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